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# **THE LAW OF PEOPLES, DISTRIBUTIVE JUSTICE, AND MIGRATIONS**

*Seyla Benhabib\**

The purpose of this Essay is a humble one. I examine the absence of any sustained focus in John Rawls's *The Law of Peoples* on cross-border movements, be they for purposes of migration or the search for refuge and asylum. I use the words "sustained focus" expressly, for a few remarks on these matters are scattered throughout the text, but they are marginal afterthoughts and in many cases, simply footnotes.

I would like to argue that Rawls ignores the movement of peoples across borders and transnational justice concerns which such movements give rise to, because of his faulty analysis of "peoples." Rawls's concept of peoples can be salvaged neither empirically nor normatively. It is empirically inadequate because it is based on poor social science; it is normatively unacceptable because it contradicts other fundamental assumptions of Rawlsian political liberalism, such as the value of individual autonomy. Put sharply, Rawls's Law of Peoples betrays the Kantian heritage of liberal cosmopolitanism and courts liberal nationalism.

After a close reading of *The Law of Peoples* in Parts I and II, I turn to global justice theorists. Global justice theorists, notably, Thomas Pogge and Charles Beitz, have gone much further than Rawls in pleading for justice across borders, but they have subsumed migratory movements under global distributive justice. I maintain that the difference principle is not adequate to help us think through transnational justice issues and that principles of "just membership" are equally central to cosmopolitan justice.

What would be the contours of cosmopolitan right in the Kantian tradition, I ask, if we proceed from the view that migratory movements have been ubiquitous throughout human history, and that the actions of sovereign states in an interdependent world constitute "pull" as well as "push" factors in migration? My answer is that the right to membership ought to be considered a human right, in the moral sense of the term, and that it should be respected as a legal right

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as well by being incorporated into states' constitutions through just citizenship and naturalization provisions.

### I. RAWLSIAN PEOPLES

Political membership has rarely been considered an important aspect of theories of domestic and international justice. John Rawls's political philosophy is no exception. By political membership, I mean the principles and practices for incorporating aliens and strangers, immigrants and newcomers, refugees and asylum seekers into existing polities. Political boundaries define some as members, others as aliens. Membership, in turn, is only meaningful when accompanied by rituals of entry, access, belonging and privilege. The modern nation-state system has regulated membership in terms of one principal category, namely, national citizenship. Rawls not only takes the institution of national citizenship as an analytical given without interrogating it further, but more significantly, he proceeds from a methodological standpoint which renders the question of political membership simply invisible.

In *Political Liberalism*, Rawls writes:

[A] democratic society, like any political society, is to be viewed as a *complete and closed social system*. It is complete in that it is self-sufficient and has a place for all the main purposes of human life. It is also closed . . . in that entry into it is only by birth and exit from it is only by death. . . . Thus, we are not seen as joining society at the age of reason, as we might join an association, but as being born into a society where we will lead a complete life.<sup>1</sup>

Surely, Rawls meant to use the model of a closed society as a counterfactual fiction, as a convenient thought-experiment in reasoning about justice; yet by not granting conditions of entry and exit into the political community a central role in a liberal-democratic theory of justice, he assumed that the state-centric model of territorially delimited nations, with fairly closed and well-guarded borders, would continue to govern our thinking in these matters. Rawls's reasons for choosing a state-centric perspective in reasoning about international justice was made amply clear in *The Law of Peoples*:

An important role of a people's government, however arbitrary a society's boundaries may appear from a historical point of view, is to be the representative and effective agent of a people as they take responsibility for their territory and its environmental integrity, as well as for the size of their population.<sup>2</sup>

Rawls adds in the footnote to this passage that "a people has at least a

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1. John Rawls, *Political Liberalism* 40-41 (1996) (emphasis added).

2. John Rawls, *The Law of Peoples* 38-39 (1999).

qualified right to limit immigration. I leave aside here what these qualifications might be.”<sup>3</sup>

In choosing bounded political communities, and in particular the modern nation-state, as the relevant unit for developing a conception of domestic and international justice, Rawls was departing significantly from Immanuel Kant and his teaching of cosmopolitan law. If Kant’s major advance was to articulate relations of justice which were valid for all individuals considered as moral persons in the international arena, independently of their political membership, in Rawls’s *The Law of Peoples* individuals are not the principal agents of justice but are instead submerged into unities which Rawls names “peoples.” For Kant, the essence of *ius cosmopolitanum* was the thesis that all moral persons were members of a world-society in which they could potentially interact with one another. Rawls, by contrast, sees individuals as members of peoples and not as cosmopolitan citizens.

There has been considerable debate in the literature as to why Rawls would choose to develop a view of international justice from the standpoint of peoples.<sup>4</sup> This methodological beginning leads him to articulate principles of international justice not for individuals, considered as units of equal moral respect and concern in a world society, but for peoples and their representatives. But the cogency of Rawls’s definition of peoples is doubtful. An examination of Rawls’s assumptions concerning peoples will also help clarify why for him bounded communities are the privileged units of an ideal theory of global justice, whereas migratory movements, which challenge this bounded vision, become matters for non-ideal theory.

The concept of peoples is introduced by Rawls as a device of representation, much as the conception of moral individuals was in *A Theory of Justice*<sup>5</sup> and that of the citizen was in *Political Liberalism*.<sup>6</sup> A device of representation accentuates certain features of the object to be represented while bracketing or minimizing others. So it is too with the concept of peoples. Rawlsian peoples are ideally defined as “liberal peoples” and have three basic features: “a reasonably just constitutional democratic government that serves their fundamental interests; citizens united by what Mill called ‘common sympathies’; and finally, a moral nature.”<sup>7</sup> A major concern of the Rawlsian view of justice becomes how or why a Law of Peoples chosen by the representatives of liberal peoples would be acceptable to non-liberal

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3. *Id.* at 39 n.48.

4. Charles Beitz, *Rawls’s Law of Peoples*, 110 *Ethics* 669-96 (2000); Thomas W. Pogge, *Moral Universalism and Global Economic Justice*, 1 *Pol. Phil. & Econ.* 29-58 (2002); Allan Buchanan, *Rawls’s Law of Peoples: Rules for a Vanished Westphalian World*, 110 *Ethics* 697-721 (2000).

5. John Rawls, *A Theory of Justice* (1971).

6. Rawls, *Political Liberalism*, *supra* note 1.

7. Rawls, *The Law of Peoples*, *supra* note 2, at 23.

peoples as well. Hence, the Law of Peoples is developed in two steps, first from the perspective of liberal societies and subsequently from the standpoint of "decent nonliberal peoples."<sup>8</sup>

More significant though is the admixture of sociological and ethical properties that Rawls attributes to peoples. Rawls's category bundles together empirical as well as normative features. While most social scientists and historians would agree that some modicum of "common sympathies"<sup>9</sup> may be necessary to distinguish one people or nation from another, it is odd to stipulate that peoples would not be such unless they were governed by "a just constitutional democratic government."<sup>10</sup> The difficulty arises from Rawls's stringing together normative stipulations with sociological characteristics. This method of idealization makes it difficult to understand whether he intends his concept of peoples to be historically and sociologically cogent or merely normatively acceptable from the standpoint of his principles of justice. Clearly, he intends it to be both but conflating these two perspectives right at the outset creates problems that reverberate throughout the subsequent argument.

Since he wishes to avoid the pitfalls of realist international theory which takes states and their interests as the principal actors in the international arena, Rawls wishes to distinguish states from peoples. He argues that peoples, not states, are the relevant moral and sociological actors in reasoning about justice on a global scale. Yet he fails to convince that analytically a viable distinction between peoples and states can be made on his own terms. For what political form besides that of a sovereign modern state could "a just constitutional democratic government" possess?<sup>11</sup> Could this be an empire? Or a city-state? Rawls does not provide us with clear differentiations between *state-forms* and *forms of government*. Even if we sympathize with Rawls's critique of realist international theory and standard models of sovereignty, as I do, analytically more careful distinctions need to be drawn right at the outset of a theory of the law of peoples between states, peoples and government forms.

Rawls insists that peoples are not states in the first place because he does not wish to ascribe them sovereignty. Two of the most

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8. *Id.* at 5; cf. Beitz, *supra* note 4, at 675.

9. Rawls, *The Law of Peoples*, *supra* note 2, at 23.

10. *Id.*; cf. Robert H. Wiebe, *Who We Are: A History of Popular Nationalism* 5 (2002) ("*Nationalism is the desire among people who believe they share a common ancestry and a common destiny to live under their own government on land sacred to their history. Nationalism expresses an aspiration with a political objective.*" (emphasis added)). Note how Wiebe's definition finesses the question of whether people actually share a common ancestry or destiny; that they believe that they do is what is important for nationalist movements. But the social scientists need not share this belief although he reckons with it as a crucial factor in understanding nationalism. Such duality of perspectives, as between social actors and social observers and scientists, is absent from Rawls's definition of peoplehood altogether.

11. Rawls, *The Law of Peoples*, *supra* note 2, at 23.

commonly associated features of sovereignty, namely internal sovereignty over a population and external sovereignty to declare war against other sovereign units, will be derived from the law of peoples in Rawls's scheme and hence cannot be viewed as prerogatives which parties to the contract of the law of peoples already possess. Both internal sovereignty and external sovereignty will depend for their legitimacy on the law of peoples. This is a commendable aspect of Rawls's argument: He makes the legitimacy of sovereignty conditional upon a state's recognition of certain principles of justice, among them respect for human rights and a determination not to instigate war for reasons other than self-defense.<sup>12</sup> While we can follow Rawls's wish to impose moral constraints on traditional conceptions of state sovereignty, it is incoherent to envisage a people as having a constitutional government without also possessing some form of territorial sovereignty.<sup>13</sup> This then creates a dilemma for Rawls's theory: Either he must assume that peoples who are united by "common sympathies," and "ruled by a just constitutional government,"<sup>14</sup> are territorially organized semi-sovereign units, which possess features very much like states, or he must give up the stipulation that peoples are already organized into certain forms of government. If he were to accept the latter option, Rawls may need to revert to viewing individuals rather than organized peoples as the privileged units of reasoning about international justice.

Peoples cannot have the following normative features which Rawls wants to ascribe to them and not be considered as territorially circumscribed and self-governing modern states. Among the eight normative conditions which Rawls lists to characterize a people, the obligations "to observe treaties and undertakings;" to not "instigate war for reasons other than self-defense;" to "honor human rights," while unobjectionable from a moral point of view, are hardly conceivable without a modern state apparatus with standing armies, a fully developed judicial and administrative bureaucracy and other representative institutions.<sup>15</sup> Once more, the distinction between peoples with representative governments and modern states disappears.

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12. *Id.* at 37-38.

13. Cf. Andrew Kuper, *Rawlsian Global Justice: Beyond The Law of Peoples to a Cosmopolitan Law of Persons*, 28 *Pol. Theory* 640, 644 (2000).

The difference is that in Realist theory, the shell of state sovereignty may not be pierced or removed if and when a regime acts unjustly or unreasonably—this exemplifies what I shall call "thick statism"—whereas in Rawls's theory, the law of peoples reasonably constrains what a state may rightly do to its own people and other states; this exemplifies what I shall call "thin statism."

*Id.*

14. Rawls, *The Law of Peoples*, *supra* note 2, at 23.

15. *Id.* at 37.

In his defense of Rawls, Stephen Macedo has argued:

The moral significance of *states or peoples* is not really so mysterious, but let us remind ourselves what a people has done in assuming the powers of self-government. They form a union usually understood as perpetual, and assert permanent control over a given territory, perhaps as the result of a violent struggle for independence.<sup>16</sup>

Macedo clearly uses the terms peoples and states interchangeably. In doing so, he departs from the manner in which Rawls wishes to construct the steps in his theory. For Rawls, sovereign statehood must *succeed* peoplehood and the choice of the Law of Peoples and not precede them. But analytically the choice of “just constitutional government”<sup>17</sup> and its form of statehood would need to occur through the same step. Thus Rawls could develop a concept of peoples as a distinctive human collectivity persisting through time, but if he wishes to propose that such a collectivity is also to be thought of as governed by a just constitutional power, then indeed not merely peoples but peoples as organized into sovereign states are his units of analysis.

In addition to being united by common sympathies and ruled by a just, constitutional government, according to Rawls, each people should possess “a moral nature.”<sup>18</sup> Rawls proceeds here from a holistic understanding of peoples, each of whom is defined by clearly delineable boundaries and a set of clearly identifiable values and mores. In this holistic vision, peoples are viewed as carriers of a coherent moral world-view, whose contours can be identified by the social theorist, as well as being identifiable to the social agents themselves. This holistic conception of peoplehood belongs to the infancy of the social sciences.

Missing from this vision is an appreciation of the significant internal division of human societies along the lines of class, gender, ethnicity, religion, language, etc. Instead, the aspirations of liberal nationalist movements in their period of ascendancy in the second half of the nineteenth and early part of the twentieth centuries are taken as paradigmatic, and they are presented, not as ideals, but as social facts. Peoples are not found; they develop through history. A crucial way in which peoples who are riven by class, gender, ethnicity and religion develop is precisely through contestation around the terms and meaning of their common “moral nature.” Excluded and marginalized groups, such as workers and women in the early bourgeois republics, sought to transform the moral code of the nation to make it more inclusive, less focused on property hierarchies and

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16. Stephen Macedo, *What Self-Governing Peoples Owe to One Another: Universalism, Diversity, and The Law of Peoples*, 72 Fordham L. Rev. 1721, 1730 (2004) (emphasis added).

17. *Id.*, The Law of Peoples, *supra* note 2, at 23.

18. *Id.*

distinctions, and more attuned to the achievements of female citizenship. Similar struggles were repeated by excluded and marginalized racial, ethnic and religious groups. To view peoples as homogeneous entities characterized by a clearly identifiable "moral nature" and a source of "common sympathies"<sup>19</sup> is not only sociologically wrong: it is inimical to the interests of those who have been excluded because they have refused to accept or respect their people's hegemonic moral code. Rawls's vision of peoplehood slides over into nationalism. In the final analysis, his liberal nationalist vision is more nationalist than liberal, precisely because instead of treating the hegemonic aspirations of nationalist movements to forge a people united by common sympathies and a shared moral nature *as* ideological struggles, he confers upon them the status of sociological facts.

Suppose one defends Rawls's definition along the lines suggested by Charles Beitz:

The idea of a people is part of an ideal conception of the world. Rawls need not maintain that many (or even any) actual states fully satisfy the criteria for being a people in order to maintain that it would be desirable to move in the direction of the ideal. The appropriate question about the idea of a people is whether it represents a sufficiently desirable form of human social organization to serve as the basic constituent element of a world society, not whether it serves as a realistic proxy for any actually existing states.<sup>20</sup>

Beitz's defense suggests that we should judge Rawls's conception of a people normatively, in the light of ideal theory, and not in terms of its sociological adequacy. I would contend that, from the standpoint of ideal theory as well, it is undesirable to view the "Society of Peoples"<sup>21</sup> as a world-community composed of such highly integrated, homogeneous and homogenizing collectivities. The losers in this nationalist romance will be precisely those liberal and democratic norms and values which Rawls also wants to characterize peoples. Why? Because there is always and necessarily a contention, a disunity, a healthy disjunction between the *universalizing* values, norms and principles of just constitutional government and the particularistic "common sympathies" and "moral nature" of a *specific* people with a unique history and memory. Rawls minimizes the context-transcendent aspect of liberal-democratic values and norms that are otherwise so central to his own vision of justice and political liberalism. "We, the people" is a tension-riven formula, which seeks to contain the universalizing aspirations of rights claims and democratic struggles within the confines of a historically situated

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19. *Id.*

20. Beitz, *supra* note 4, at 680.

21. Rawls, *The Law of Peoples*, *supra* note 2, at 3.



collectivity. Such a collectivity has its "others" within and without. Peoplehood is an aspiration; it is not a fact.

I am not seeking to make a skeptical postmodernist claim about the instability of identity-categories. Rather, I am emphasizing that, particularly for peoples who are governed by liberal-democratic institutions, there cannot be, nor is it desirable that there ought to be, an uncontested collective narrative of common sympathies and of a unique moral nature. Collective identities are formed by strands of competing and contentious narratives, through which universalizing aspirations and particular memories compete with one another to create temporary narrative syntheses, which are then challenged and riven by new divisions and debates. Narratives of peoplehood, and in particular of liberal-democratic peoplehood, evolve historically through such contentions and disputations.<sup>22</sup>

Rawls's view of peoples is neither ethically nor sociologically defensible. Even if we grant Rawls the legitimacy of idealizations, these idealizations are not neutral steps toward a normative argument, but have normative consequences themselves. Allan Buchanan names a further consequence of Rawls's view:

Rawls assumes that, for purposes of a moral theory of international relations, the standard case is that of a state whose population is unified by a shared political culture, a common conception of public order—in other words, a state within which there are no conflicts over fundamental issues of justice or the good and no divisions over which groups are entitled to their own states or to special group rights.<sup>23</sup>

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22. Rogers M. Smith, *Stories of Peoplehood: The Politics and Morals of Political Membership* (2003). I have presented in more detail my conception of the narrative constitution of identities in Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* 6 (2002). I am assuming that identities are demarcated through contested narratives for two reasons: human actions and relations are formed through a double hermeneutic. We *identify* what we do through an *account* of what we do; words and deeds are equally primordial, in the sense that almost all socially significant human actions are identified as a certain *type* of doing through the accounts that agents and others give of that doing. Second, not only are human actions and interactions constituted through a "web of narratives," but they are also constituted through the actors' *evaluative* stances toward their doings. *Id.* at 7. These are second-order narratives that entail a normative attitude toward first-order ones.

Rawls could object by claiming that the use of complicated philosophical premises and sociological theories is illicit in reasoning about justice, since we have to confine ourselves to such premises as can be shared by "public culture." I have always found this a particularly stifling aspect of Rawlsian theory, which is inimical to the enlightenment function of much theory and philosophy. Even leaving this matter aside, however, I would argue that Rawls relies on social science throughout his work and in *The Law of Peoples* as well, so that the question is not whether one utilizes assumptions and facts from sociology, history and economics but which *kinds of facts and theories* are used. Rawls sidesteps debates among "constructivists" and "essentialists" in studies of nationalism and presents essentialism as if it were an uncontested position. *See id.* at 5-22, 187-89.

23. Buchanan, *supra* note 4, at 717.

Such a vision of "deep political unity" ignores *intrastate* conflict; it neglects the claims and grievances of groups who find neither voice nor representation for their cultures and ways of life within the confines of such a political culture. Consequently, minority group rights, or the cultural citizenship rights of peoples who are not organized as states themselves, but who are members of larger sovereign states—such as the Aborigines in Australia, First Nations in Canada, Native Americans in the USA, and the Indios in Latin America—disappear from the landscape of the Rawlsian peoples.<sup>24</sup>

Let me return to Rawls's claim:

[A] democratic society, like any political society, is to be viewed as a *complete and closed social system*. It is complete in that it is self-sufficient and has a place for all the main purposes of human life. It is also closed . . . in that entry into it is only by birth and exit from it is only by death. . . . Thus, we are not seen as joining society at the age of reason, as we might join an association, but as being born into a society where we will lead a complete life.<sup>25</sup>

In view of the preceding discussion, Rawls's point of view is more intelligible, although much less defensible. Precisely because he views peoples as constituting discrete entities unified by a common moral nature, a democratic people for Rawls comes to resemble a moral cosmos; in fact, it *is* a moral cosmos. The assumption that we enter society by birth and that we must be viewed as "leading a complete life"<sup>26</sup> within it, which we exit only in death, is so wildly off the mark historically, that its use by Rawls can only be understood in the light of broader presuppositions concerning peoplehood and nations.

The tension between the universalistic premises of Rawls's political liberalism and the more particularistic orientations of his *Law of Peoples* come fully to light around this matter. To view political society as a "complete and closed"<sup>27</sup> social system,<sup>28</sup> is not compatible with other premises of Rawlsian liberalism. Rawls understands persons to be endowed with two moral powers: a capacity to formulate and pursue an independent conception of the good, and a capacity for a sense of justice and to engage in mutual cooperative ventures with others. Each of these capacities could potentially bring the individual into conflict with the vision of a democratic society as a "closed and complete system." Individuals may feel that their understanding of the good, be it for moral, political, religious, artistic

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24. See Benhabib, *supra* note 22, at 122-46 (discussing cultural groups' rights).

25. Rawls, Political Liberalism, *supra* note 1, at 40-41 (emphasis added).

26. *Id.*

27. It is unclear how Rawls intends us to understand the term "closed." Does he mean that such societies do not permit emigration or immigration? Then they would not be liberal societies but authoritarian regimes. Countries behind the Iron Curtain were "closed" in that they prohibited emigration and closely regulated internal migration. *But cf.* Rawls, The Law of Peoples, *supra* note 2, at 74 n.15.

28. Rawls, Political Liberalism, *supra* note 1, at 41.

or scientific reasons, obliges them to leave the society into which they were born and to join another society. This implies then that individuals, in pursuit of their sense of the good, ought to have a right to leave their societies. Emigration must be a fundamental liberty in a Rawlsian scheme, for otherwise his conception of the person becomes incoherent. The language of a "closed and complete society" is incompatible with the liberal vision of persons and their liberties.

If it is the case then that some individuals' conceptions of the good may induce them to leave their countries of citizenship, we also have to assume that there may be "common sympathies" and "communities of shared moral sense" which may not overlap with the boundaries of peoplehood. We speak of "a republic of letters"; of "workers of the world"; of "international and transnational women's groups." One of the oldest international institutions in Western societies is the Catholic Church itself. One's sense of the moral good may or may not overlap with the boundaries of one's people. It is most likely that individuals in liberal-democratic cultures will be creatures with multiple, and often conflicting, visions of the good; they will have overlapping attachments to partial communities; in short they will be caught in circles of overlapping and intersecting sympathy and identification.

A crucial consequence of these reflections is that Rawls's own commitment to legitimate moral and political pluralism is jeopardized by his vision of closed societies. While he is ready to recognize *intragroup* pluralism across the boundaries of peoples and to accept that there will be "decent hierarchical peoples," whose lives and values will be different than those who live in secular, liberal Western democracies, it is odd that Rawls does not acknowledge *intergroup* pluralism. Within Western democratic societies as well there are many groups and individuals who bear affinity with, and share the value systems of, decent hierarchical peoples. Put sharply, observant Muslims and observant Jews are not "elsewhere"; they are our neighbors, citizens, and ourselves in liberal-democratic societies. Value pluralism at the *intragroup* level is parallel to value pluralism at the *intergroup* level. "The other" is not elsewhere.

The concept of a closed and complete democratic society is no more plausible than Rawls's conception of peoplehood and for much the same reason. In each case, Rawls subordinates his understanding of moral personhood to the fiction of peoplehood. There is an irresolvable tension in his formulations between the ideals of autonomous personality, even in its watered-down weak Kantian versions, and that of a closed and complete society. His own understanding of the person ought to have led him to view societies as much more interactive, overlapping, and fluid entities, whose boundaries are permeable and porous, whose moral visions are

exchanged, transported across borders, assimilated into other contexts, and re-exported back into the home country.

## II. MIGRATIONS IN *THE LAW OF PEOPLES*

It should thus come as no surprise that migrations would not be considered as an aspect of *The Law of Peoples* and its regulation would not be a topic of ideal theory. For Rawls, migratory movements are episodic and not essential to the life of peoples; conditions of entry and exit into liberal-democratic societies are peripheral for evaluating the nature of these societies. Nevertheless, Rawls does not completely relegate migrations to non-ideal theory, that is, to the discretion of practices which would be neutral from a moral point of view, he does name several conditions which he views as morally legitimate in limiting immigration.

The first argument is a version of “the tragedy of the commons.” Unless a definite agent is given responsibility for maintaining an asset and bears losses for not doing so, Rawls reasons, a people’s territory cannot be preserved in perpetuity for others.<sup>29</sup> This argument then leads to the conclusion that there *must* be boundaries of some kind. Notice here that Rawls is arguing against radically open borders. But since he does not weigh the “tragedy of the commons” line of reasoning against evidence of benefits—economic and otherwise—to be derived from open borders, the reader has to accept on a common-sense basis that yes, indeed, borders of some kind may be necessary. There is sufficient empirical evidence, however, that open and fairly porous borders which enable the free movement of peoples, goods and services across state boundaries are highly beneficial to the functioning of free market economies. Important empirical evidence drawn from the economics of migration could offset Rawls’s exclusive reliance upon the “tragedy of the commons” perspective.<sup>30</sup>

Rawls’s second reason for limiting immigration “is to protect a people’s political culture and its constitutional principles.”<sup>31</sup> Why does Rawls assume that immigration would threaten political culture

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29. Rawls, *The Law of Peoples*, *supra* note 2, at 39.

30. The Economist, *A Modest Contribution*, in Special Supplement, A Survey of Immigration 12-13 (November 2, 2002).

At a given moment, migrants are generally net contributors to the public purse: they are disproportionately of working age, and the receiving country has not had to pay for their education. A study by Britain’s Home Office estimated that the foreign-born population paid about 10% more to the government than it received in expenditure. However, a magisterial study in 1997 of the economic impacts of immigration, by America’s National Research Council, found that the picture changes if one looks across time instead of taking a snapshot. In that case, the NRC found, first-generation immigrants imposed an average net fiscal cost of \$3,000 at present discounted value; but the second generation yielded a \$80,000 fiscal gain.

*Id.*

31. Rawls, *The Law of Peoples*, *supra* note 2, at 39 n.48.

and constitutional principles, unless he takes it for granted that immigrants are somehow alien and unruly elements, unlikely to be integrated or educated in the ways of the host country? Why does Rawls conceive of the immigrant as a threat? What historical or social-scientific basis is there for the claim that immigrants have destroyed a country's political culture rather than transforming it, that they have not defended, enriched, as well as challenged constitutional principles?

Consider some contemporary cases: Certainly, the predicament of the Palestinian refugees after 1948 and in the succeeding decades in Lebanon added to that country's destabilization and eventually resulted in the civil war of the 1980s. In Afghanistan, the Muslim "mujahadeen" (freedom fighters) of the Northern Alliance and the more Islamist Taliban, who had been principally organized among the Afghan refugees in Pakistan, fought together to end the Soviet invasion. The return of these Afghan refugees to their country eventually tipped the balance in favor of the Taliban regime which then provided Al-Qaeda with a free operating ground. But these cases can be hardly considered examples of regularized migration flows or even of typical refugee and asylum resettlements. These developments are tied in with profound local dynamics, such as the already existing conflict in Lebanon among Muslim and Christian Arabs, and the radical divergence in Afghanistan among secular and religious contra-Soviet fighters. In these instances, migratory movements indeed acted as catalysts to the unraveling of already existing local tensions.

More commonly though, rather than damaging a people's political culture and its constitution, migrants revitalize it and deepen it. Such was the contribution of exiled liberals and socialists to the political cultures of nineteenth-century Paris and London; certainly American political culture in the late-nineteenth and early twentieth centuries is unthinkable without the contributions of immigrant Irish, Italian, Jewish, Polish and other communities. Nor is it conceivable to think of the American university in the post-World War II period without taking into account the contributions of the many exiled European scholars. Migratory movements alone, and without crucial dislocations and tensions already at work in the receiving societies themselves, do not threaten a people's political culture and its constitutional principles.

Finally, Rawls does acknowledge a "*duty* to assist burdened societies,"<sup>32</sup> and suggests that liberal peoples can acquit themselves of the moral obligations they owe to other less fortunate societies through economic aid and assistance.<sup>33</sup> I shall discuss at more length

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32. *Id.* at 106.

33. *Id.* at 106-07.

why this natural duty of assistance needs to be distinguished carefully from a global redistributive principle. The natural duty of assistance has implications for migration rights, in that such assistance to economically poor and disadvantaged societies is expected to reduce the pressure of migratory movements on richer societies. In a world of great economic disparities, in which the pull of higher standards of living in wealthier countries is an undeniable cause of migrations, such assistance could certainly help ease pressure in some regions of the world for certain periods of time.<sup>34</sup> Rawls's perspective would thus justify that nations who engage in foreign aid to those countries or regions of the world which are senders, could impose a harsher regime of migration, such as to minimize entry into their societies. Moral balancing acts as between duties of assistance to others and the legitimate self-interest of states are endemic to migration debates and policies; they are indeed part of the arsenal of realist politics in this domain. Yet it is necessary to formulate some clearer criteria of what would be acceptable or unacceptable migration policies on the part of liberal democratic states. As commonsensical as such balancing acts may appear, they need to be refined and redefined through careful distinctions as between the moral claims of migrants on the one hand and those of refugees and asylum seekers on the other. For toward the latter, states which are signatories to various international conventions, bear not only moral but also legal obligations. These distinctions, which were so crucial to the cosmopolitan considerations of Kant, find no place in Rawls's scheme. I do not believe that this omission is a matter of oversight alone but that rather it is a consequence of Rawls's ideal theory of peoples in the world community.

In the final analysis Rawls's realist utopia aims at a radical solution to world migratory movements. In a society of liberal and decent peoples there would be no persecution of religious and ethnic minorities, no political oppression, no population pressure, no inequality between men and women, and economic inequalities would diminish. Thus, "[t]he problem of immigration is not, then, simply left aside, but is eliminated as a serious problem in a realistic utopia."<sup>35</sup> In Rawls's ideal utopia, peoples become windowless monads who have no interest in mixing, mingling and interacting with others. This is certainly a vision of an ordered world, but it is also the vision of a static, dull world of self-satisfied peoples, who are indifferent not only to each others' plight but to each others' charms as well.

In conclusion: The Rawlsian Law of Peoples does not continue upon the terrain charted by Kant's doctrine of cosmopolitan right in that Rawls does not consider individuals to be the moral and political

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34. See *The Economist*, *supra* note 30.

35. Rawls, *The Law of Peoples*, *supra* note 2, at 9.

agents of a world-society, but rather chooses peoples to be the principal actors in this arena. Notwithstanding disclaimers to the contrary, Rawls cannot distinguish analytically between peoples and states with the consequence that cosmopolitan right is sacrificed on the altar of states' security and self-interest.

Rawls is admirably clear on where he departs from views of cosmopolitan justice. He writes:

Some think that any liberal Law of Peoples . . . should begin by first taking up the question of liberal cosmopolitan or global justice for all persons. They argue that in such a view all persons are considered to be reasonable and rational and to possess what I have called 'the two moral powers' . . . . Following the kind of reasoning familiar in the original position for the domestic case, the parties would then adopt a first principle that all persons have equal basic rights and liberties. Proceeding this way would straightaway ground human rights in a political (moral) conception of liberal cosmopolitan justice.<sup>36</sup>

Rawls believes that it is implausible to proceed in this way, for this procedure would impose a metaphysical or comprehensive view of liberalism upon all peoples. He rejects this philosophically, but he also seems concerned that such a view would necessarily lead to an expansionist, intolerant and possibly belligerent foreign policy on the part of liberal peoples.<sup>37</sup>

I have argued that Rawls's commitment to legitimate moral and political pluralism is compromised by his vision of democratic peoples as living in closed societies. A more radical pluralism would lead to the acknowledgment of the multiple and dynamic ties, interactions and crisscrossing of peoples. As opposed to the vision of a "closed" society into which individuals are born and which they leave only in death, I shall proceed from the assumption that liberal peoples ought to have fairly open borders. Such societies not only permit a fundamental right to *emigrate*, but they coexist within a system of mutual obligations and privileges, an essential component of which is the privilege to *immigrate*, that is, to enter another peoples' territory and become a member of its society peacefully. Peoples are radically and not merely episodically interdependent. Nation-states develop in history as units of a system of states. They emerge out of the ruins of old multinational empires. Many nation-states emerged in Europe and the Middle East after the collapse of the Austria-Hungarian, the Russian, and the Ottoman Empires at the end of World War I. The decolonization struggles against the British, French, Portuguese and Dutch empires in the aftermath of World War II resulted in new states being born in Asia, Africa and elsewhere. Beginning with the

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36. *Id.* at 82.

37. *Id.* at 82-83.

nineteenth century, Latin American nations struggled against the Spanish empire. I view peoples and states therefore as actors developing in the context of a world-society. The nation-state, which combines territorial sovereignty with aspirations to cultural homogeneity and democratic constitutional government, is a unique product of world-society as it undergoes political modernization.

### III. TOWARD A RADICALIZED RAWLSIANISM

#### A. *Moral Cosmopolitanism*

It should come as no surprise that for many students of Rawls, his views on cosmopolitan justice have proven a source of disappointment. Radicalizing Rawls's intentions against Rawls himself, Joseph Carens has drawn completely different conclusions from Rawlsian premises. In an early article, Joseph Carens used the device of the Rawlsian "veil of ignorance," and against the intentions of Rawls himself, to think through principles of justice from the standpoint of the refugee, the immigrant, and the asylum seeker.<sup>38</sup> Are the borders within which we happen to be born, and the documents to which we are entitled, any less arbitrary from a moral point of view than other characteristics such as skin color, gender, and genetic make-up with which we are endowed? Carens's answer is "no." From a moral point of view, the borders which circumscribe our birth and the papers to which we are entitled are arbitrary, since their distribution among individuals does not follow any clear criteria of moral achievement and moral compensation. Citizenship status and privileges, which are simply based upon territorially defined birth-right, are no less arbitrary than one's skin color and other genetic endowments. Therefore, claims Carens, liberal democracies should practice policies which are as compatible as possible with the vision of a world without borders.

#### B. *Legal Cosmopolitanism*

In recognition of the difficulties of translating such universal moral obligations into viable political forms at the global level, Thomas Pogge has distinguished between "moral cosmopolitanism," which asserts that "every human being has a global stature as an ultimate unit of moral concern" and "legal cosmopolitanism."<sup>39</sup> Legal cosmopolitanism "is committed," in Pogge's words, "to a concrete political ideal of a global order under which all persons have equivalent legal rights and duties, that is, are fellow citizens of a

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38. Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, in *Theorizing Citizenship* 229 (Ronald Beiner ed., 1995).

39. Thomas W. Pogge, *Cosmopolitanism & Sovereignty*, 103 *Ethics* 48, 49 (1992).



universal republic."<sup>40</sup> Pogge wants to defend a set of institutionalized global ground rules, which, while falling short of a world-state, will nonetheless move the global status quo toward a more cosmopolitan world order in the legal sense.

Pogge's formulations remind us of a difficulty which Kant had also confronted, namely, whether moral cosmopolitanism would inevitably result in a "universal monarchy," i.e., a world government. Kant argued that such a world government would be a "soulless despotism."<sup>41</sup> While rejecting the idea of a world state, Kant embraced the idea of a society of peoples, each of whom would be governed by a set of similar republican principles, but which, nonetheless, would permit some variation. Is legal cosmopolitanism compatible with republican or democratic freedom? What variation in legal institutions and the schedule of human rights is permissible within a legal cosmopolitan framework?

A clear implication of any moral and legal cosmopolitan position is that existing disparities in the living standards and life expectations of the world's peoples ought to be subject to critique and reform. As was the case for Kant, so too for Pogge and Beitz, it is *individuals* who are the units of moral and legal rights in a world society and not *peoples*. People's interactions are continuous and not episodic; their lives and livelihoods are radically, and not only intermittently interdependent, as they were in the Rawlsian model. While neither Pogge nor Beitz directly address matters of migration, their positions have clear implications for migration rights and just membership.

### C. *The Duty of Assistance Versus Global Distributive Justice*

For Rawls, "[w]ell-ordered peoples have a *duty* to assist burdened societies."<sup>42</sup> Yet, according to Rawls, it is not the case "that the only way, or the best way, to carry out this duty of assistance is by following a principle of distributive justice to regulate economic and social inequalities among societies."<sup>43</sup> For many of Rawls's

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40. *Id.* at 49.

41. Immanuel Kant, *Perpetual Peace*, in *On History* 85, 113 (Lewis White Beck trans. & ed., 1957) (1795).

42. Rawls, *The Law of Peoples*, *supra* note 2, at 106. Rawls leaves the sources of this duty unclear. While the duty to assist others in need is included in most systems of individual morality, whether Kantian, rule-utilitarian, or intuitionist, it is unclear what the sources of such obligations among collectivities would be. One possible answer is that the "Society of Peoples" must be viewed as a system of cooperation in which each people has a duty to improve the conditions of all others such that some form of equality among them may be attained. If this is Rawls's reasoning, *cf. id.* at 18-19, then liberal cosmopolitans such as Beitz and Pogge are justified in asking why a system of cooperation may not be subjected to even more demanding criteria of equality among the cooperating parties.

43. *Id.* at 106.

sympathizers, this claim has seemed inconsistent at best and hypocritical at worst. Thomas Pogge sarcastically observes:

As it is, the moral debate is largely focused on the question to what extent affluent societies and persons have obligations to help others worse off than themselves. Some deny all such obligations, others claim them to be quite demanding. Both sides easily take for granted that it is as potential helpers that we are morally related to the starving abroad. This is true, of course. *But the debate ignores that we are also and much more significantly related to them as supporters of, and beneficiaries from, a global institutional order that substantially contributes to their destitution.*<sup>44</sup>

A similar criticism was expressed by Charles Beitz in *Political Theory and International Relations*:

International interdependence involves a complex and substantial pattern of social interaction, which produces benefits and burdens that would not exist if national economies were autarkic. In view of these considerations, Rawls's passing concern for the law of nations seems to miss the point of international justice altogether. In an interdependent world, confining principles of social justice to domestic societies has the effect of taxing poor nations so that others may benefit from living in "just" regimes.<sup>45</sup>

The disagreement about the scope and content of principles of distributive justice on the global scale involves methodological as well as empirical divergences among Rawls and his more radical followers. Rawls, while not denying that the international system is one of interdependencies, clearly views this fact to be of secondary importance in determining a country's wealth or poverty. The causes of "the wealth of nations" are endogenous and not exogenous. A country's wealth is determined by "its political culture," by religious, philosophical and moral traditions that support its basic structure, as well as by the moral qualities of its people, such as their industriousness and cooperative talents.<sup>46</sup> There is remarkably little social scientific evidence that Rawls adduces to support this assertion.<sup>47</sup> These assertions rest less on empirical evidence but more on Rawls's methodological take-off point which views liberal peoples as living in well-ordered societies, whose good fortune is a consequence of their own institutions and moral nature. In this remarkably Victorian account of the wealth of nations, the plunder of

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44. Pogge, *supra* note 4, at 50.

45. Charles R. Beitz, *Political Theory and International Relations* 149-50 (1999).

46. See Rawls, *The Law of Peoples*, *supra* note 2, at 109.

47. Rawls cites David Landes, *The Wealth and Poverty of Nations* (1998); Amartya Sen, *Poverty and Famine* (1981); Amartya Sen and Jean Dreze, *Hunger and Public Action* (1989). But Sen's perspective on these matters is much more globalist and structural, and less culturalist and nation-state centered than Landes's. Rawls glosses over these differences.

Africa by all Western societies is not mentioned even once; the global character of the African slave trade and its contribution to the accumulation of capitalist wealth in the United States and the Caribbean Basin is barely recalled; the colonization of the Americas disappears from view, and it is as if the British never dominated India and exploited its riches. These historical omissions are of such magnitude in a work on the law of peoples that we have to ask why Rawls has imposed blinders which affect his sight of justice so drastically.

My purpose is not to rehash well-known debates about the origins of capitalism in the West—the so-called “good fortune” of liberal peoples—and about the interdependence of capitalism and imperialism. I take it that it would be historically grossly inadequate to consider the development of capitalism without also taking into account the history of Western imperialism.<sup>48</sup> It is also not necessary to render quick judgments on these complex world-historical processes: Whether early capitalist accumulation in the West would have been possible without colonial expansion is doubtful, but it is equally clear, as Max Weber has instructed us, that the moral and cultural value transformations leading to the formation of the “Protestant ethic” in the West, had indigenous sources.<sup>49</sup> These sources lie in the intellectual and moral dynamic of the scientific and Protestant revolutions which, although they eventually attained world-wide significance, originated first in the West *alone*. The “wealth of nations” needs to be examined in light of the history of the world economy; the methodological distortions caused by assumptions of cultural autarky need to be discarded. I join Beitz when he writes:

It is easier to demonstrate that a pattern of global interdependence exists, and that it yields substantial aggregate benefits, than to say with certainty how these benefits are distributed under existing institutions and practices or what burdens these institutions and practices impose on participants in the world economy.<sup>50</sup>

Does global interdependence suggest then that the world economic system is a “system of cooperation”? A system of cooperation means that the rules distributing obligations as well as benefits would be clearly identifiable and known or, in principle at least, knowable, to the participants.<sup>51</sup> Since he denies that the world economy can be

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48. See generally E.J. Hobsbawm, *The Age of Capital, 1848-1875* (1975); E.J. Hobsbawm, *The Age of Empire, 1875-1914* (1987); Eugene D. Genovese, *The Political Economy of Slavery: Studies in the Economy and Society of the Slave South* (1989).

49. See generally Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Talcott Parsons trans., Routledge 2d ed. 1992) (1930).

50. Beitz, *supra* note 45, at 145.

51. I introduce this caveat for the following reason: although I may not know how the car insurance or the social security system may work, how insurance premiums are set and social security benefits disbursed, in principle, I could find out *if* I choose to.

understood along these lines, Rawls maintains that principles of distributive justice cannot be applied to this domain. Whereas in a system of cooperation there would be clear rules and patterns for distributing benefits and obligations, the world economy can hardly be the object of such clear and transparent judgments. Thus global distributive justice principles, despite their considerable appeal, do not have "a defined goal, aim, or cut-off point."<sup>52</sup> Rawls is only partially right in this objection. The world economy, while not being a pure system of cooperation, also includes organizations such as the WTO and the IMF, which have very clear rules of cooperation. In addition, the world economy encompasses a myriad of patterns and trends generated by the unintended consequences of individual actors.

The world economy, or for that matter any economic system, possesses features of cooperation as well as the logic of unintended consequences. Think, for example, of the stock market: While there are clearly defined rules of cooperation—at least in principle—as to how stocks can be bought and sold, as to how their values are rated, at the end of the day what makes the stock market work is precisely "the logic of unintended consequences." Once these rules of cooperation are established, no one can predict, and in principle ought not to be able to predict, what results the market produces. Insider trading is regulated because it skews the logic of unintended consequences by destroying the fairness of the rules of cooperation. Unlike free marketers, I have no faith that the logic of unintended consequences is always rational or just. Obviously governments and other regulatory agencies interfere precisely to rectify dysfunctionalities resulting from the play of market forces. If we concede to Rawls then that the world economy is not a pure system of cooperation, but a mixed domain showing features of cooperation and competition, organization and the logic of unintended consequences, what follows for the global redistributive position?

The world economy, while falling short of being a perfect system of cooperation, is one of significant interdependences with non-negligible distributive consequences for the players involved. Within this system, there are public and semi-public international bodies and organizations which have regulatory functions such as the World Trade Organization, the International Monetary Fund, the Agency for International Development and treaty associations such GATT and NAFTA. Increasingly, these organizations are moving toward a

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A system of cooperation, as opposed to a system of "unintended consequences," is based on knowable rules and regulations. Social and economic life, however, is governed by both kinds of schemes: systems of cooperation as well as the logic of unintended consequences. The economic market is a social sphere which combines both features. Some would even argue that it functions as a system of cooperation precisely because it is based on the logic of unintended consequences.

52. Rawls, *The Law of Peoples*, *supra* note 2, at 106.

model of global cooperation, which intends to control and to ameliorate the havoc that the logic of unintended consequences can cause. Global justice theorists are right in demanding contra Rawls that these bodies ought to be rendered increasingly accountable for their actions and transparent in their decision making to their constituencies. Even if the world economy is not a system of cooperation, precisely because it reveals significant patterns of interdependence, as well as being influenced by quasi-governing bodies, there is a great deal of room for reforms in this domain which would go well beyond the natural duty of assistance to burdened peoples.

The world community, I want to suggest, should be viewed as a *global civil society*, in which peoples organized as states are major players, but by no means the *only* players. A cosmopolitan perspective takes its starting point from the Kantian view that if the actions of one can affect the actions of another,<sup>53</sup> then we have an obligation to regulate our actions under a common law of freedom which respects our equality as moral agents. The consequences of our actions generate moral obligations; once we become aware of how our actions influence the well-being and freedom of others, we must assume responsibility for the unintended and invisible consequences of our individual and collective doings. We are constantly discovering such interdependencies and becoming aware that what we eat, drink, smoke, consume as energy in our homes, and drive has substantial impact upon the lives of others to whom we may not even be remotely related. There is a dialectic here between the growth of social knowledge and the spread of moral responsibility. In Kantian language, if the will of one can limit the will of another in the external domain of actions, then we are intertwined in the moral net of responsibilities and obligations. Such is the situation with the world economy: While very clear judgments about the specific effects of this or that policy upon others' lives and well-being may not always be at hand, we are permanently challenged by discovering the unintended consequences of our actions as well as by discovering the regulatory and interventionist measures of world-governing bodies. Such knowledge creates moral responsibility. It is no longer morally permissible for car drivers and industries in Chicago, for example, to ignore that their actions are causing acid rain in Canada; nor should it be possible for those living in the U.S. to ignore that the agricultural abundance of California is owed to, in large measure even if not wholly, to the sweat, blood and toil of illegal Mexican workers, whose cheap seasonal labor has made possible the harvest of abundance we reap.

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53. Immanuel Kant, *The Metaphysical Elements of Justice* 34, 52 (John Ladd trans., 1965) (1797).

Beitz and Pogge thus draw the conclusion that a global redistributive principle must be applicable to the world-economic system. As Beitz writes: "In particular, if the difference principle ('Social and economic inequalities are to be arranged so that they are . . . to the greatest benefit of the least advantaged.') would be chosen in the domestic original position, it would be chosen in the global original position as well."<sup>54</sup>

The debate as to whether the global redistributive principle is best thought of as a version of a Rawlsian difference principle or as some form of Pogge's global egalitarian principle is not one that I will pursue further in this context. For even if we endorse some form of global redistribution and hope to design institutions which would avoid the pitfalls of world government while achieving more global distributive justice, we will not be able to address the normative dimensions of migratory movements by redistributive measures alone.<sup>55</sup> In many cases, improved living conditions in poorer regions of the world encourage rather than discourage migrations.

With reference to the economic causes of migration, for example, Hania Zlotnik writes:

Given that economic considerations are at the root of most international migration, the latter is significantly influenced by developments in the world economy. . . . The promotion of freer trade either within trading blocs or at a more general level is deemed to have important consequences for international migration. . . . However, since the process of development itself is recognized to set in motion forces that promote migration, it is not evident whether the successful participation of developing countries in the world economy and the trading system will *enhance or reduce* the potential for international migration.<sup>56</sup>

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54. Beitz, *supra* note 45, at 151; *see also* Pogge, *supra* note 4.

55. Although liberal cosmopolitans do not address migration centrally, one can assume that they see migratory flows as aspects of global redistribution through which the poor of the earth claim a share of the wealth of richer countries by seeking access to them. Commenting on Henry Sidgwick's plea for restricting immigration in order to maintain a society's internal cohesion, Beitz points out:

[U]nder contemporary conditions, it seems unlikely that the value derived by their citizens from the cohesion and order of relatively well-endowed societies is greater than the value that could be gained by others from the redistribution of labor (or wealth) that would be brought about by adherence to cosmopolitan policies.

Beitz, *supra* note 45, at 209. Beitz's argument is utilitarian; it aggregates the value derived by citizens of closed societies and compares it to those of immigrants who want to enter them. Although the benefits of the flexible movements of peoples across national borders are considerable, and from the standpoint of the receiving countries not at all negligible, migratory movements are not about economic interests alone. I discuss the challenge of decline of citizenship theorists to global redistributionists in Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (2004).

56. Hania Zlotnik, *Past Trends in International Migration and Their Implications*

A post-Westphalian conception of sovereignty will need to address migration and cross-border movements on their own terms and without subsuming them under distributive justice. Trans-border movement rights belong among fundamental human freedoms, and cannot be made to depend upon the outcome of redistributive measures.

#### IV. POST-WESTPHALIAN DEVELOPMENTS AND CROSS-BORDER JUSTICE

To appreciate why Rawls and global justice theorists significantly diverge from Kant's understanding of cosmopolitan right in evaluating cross-border movements, I will briefly turn to Kant himself. This brief consideration will show that Kant considered the rights of peoples to engage in cross-border movements to be an individual moral right. His formulations presciently anticipate the distinctions in international law between migrants on the one hand, and refuge and asylum seekers on the other.

Written in 1795, upon the signing of the Treaty of Basel by Prussia and revolutionary France, Kant's essay on "Perpetual Peace" has enjoyed considerable revival of attention in recent years.<sup>57</sup> What makes this essay particularly interesting under the current conditions of political globalization is the visionary depth of Kant's project for perpetual peace among nations. Kant formulates three definitive articles for perpetual peace among states. These read: "The Civil Constitution of Every State should be Republican"; "The Law of Nations shall be founded on a Federation of Free States"; and "The Law of World Citizenship Shall be Limited to Conditions of Universal Hospitality."<sup>58</sup> Much scholarship on this essay has focused on the precise legal and political form that these articles could or would take, and on whether Kant meant to propose the establishment of a world-federation of republics or a league of sovereign nation-states.

What remains frequently uncommented upon is the Third Article of *Perpetual Peace*, the only one, in fact, which Kant himself explicitly designates with the terminology of the *Weltbürgerrecht*. The German reads: "*Das Weltbürgerrecht soll auf Bedingungen der allgemeinen Hospitalität eingeschränkt sein.*"<sup>59</sup> Kant himself notes the oddity of the locution of "hospitality" in this context, and therefore remarks that "it

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for *Future Prospects*, in *International Migration into the 21st Century: Essays in Honor of Reginald Appleyard* 227 (M.A.B. Siddique ed., 2001).

57. *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal* (James Bohman & Matthias Lutz-Bachman eds., 1997).

58. Immanuel Kant, *Zum Ewigen Frieden: Ein philosophischer Entwurf*, in Immanuel Kants Werke 434-46 (A. Buchenau et al. eds., 1923) (1795) [hereinafter Kant, *Zum Ewigen Frieden*]; Kant, *supra* note 41, at 92-105.

59. Kant, *Zum Ewigen Frieden*, *supra* note 58, at 443.

is not a question of philanthropy but of right.”<sup>60</sup> In other words, hospitality is not to be understood as a virtue of sociability, as the kindness and generosity one may show to strangers who come to one’s land or who become dependent upon one’s act of kindness through circumstances of nature or history; hospitality is a right which belongs to all human beings insofar as we view them as potential participants in a world republic. The right of hospitality is odd in that it does not regulate relationships among individuals who are members of a particular civil entity and under whose jurisdiction they stand; this right regulates the interactions of individuals who belong to different civic entities yet who encounter one another at the margins of bounded communities. The right of hospitality is situated at the boundaries of the polity; it delimits civic space by regulating relations among members and strangers. Hence the right of hospitality occupies that space between human rights and civil rights, between the right of humanity in our person and the rights that accrue to us insofar as we are members of specific republics.

Kant writes:

Hospitality (*Wirtbarkeit*) means the right of a stranger not to be treated as an enemy when he arrives in the land of another. One may refuse to receive him when this can be done without causing his destruction; but, so long as he peacefully occupies his place, one may not treat him with hostility. It is not the right to be a permanent visitor (*Gastrecht*) that one may demand. A special beneficent agreement (*ein . . . wohlthätiger Vertrag*) would be needed in order to give an outsider a right to become a fellow inhabitant (*Hausgenossen*) for a certain length of time. It is only a right of temporary sojourn (*ein Besuchsrecht*), a right to associate, which all men have. They have it by virtue of their common possession (*das Recht des gemeinschaftlichen Besitzes*) of the surface of the earth, where, as a globe, they cannot infinitely disperse and hence must finally tolerate the presence of each other.<sup>61</sup>

Kant distinguishes the “right to be a permanent visitor,” which he calls *Gastrecht*, from the “temporary right of sojourn.”<sup>62</sup> The right to be a permanent visitor is awarded through a freely chosen special agreement which goes beyond what is owed to the other morally, and what he is entitled to legally; therefore, Kant names this a “*wohlthätiger Vertrag*,” a contract of beneficence.<sup>63</sup> It is a special privilege which the republican sovereign can award certain foreigners who abide in their territories who, perform certain functions, who represent their respective political entities, and engage in long-term trade, and the like. The “*droit d’aubaine*” in pre-revolutionary France, which

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60. Kant, *supra* note 41, at 102.

61. Kant, *Zum Ewigen Frieden*, *supra* note 58, at 443; Kant, *supra* note 41, at 102.

62. Kant, *supra* note 41, at 102-03.

63. Kant, *Zum Ewigen Frieden*, *supra* note 58, at 443; Kant, *supra* note 41, at 103.



granted foreigners certain rights of residency, the acquisition of property, and the practicing of a profession, would be pertinent historical examples. The special trade concessions which the Ottoman Empire, China, Japan and India granted Westerners from the eighteenth century onward would be others. The Jews in pre-modern Europe, who after their persecution through the Inquisition in Spain in the fifteenth century, spread to the north, to Holland, Britain, Germany and other territories, would be another major group to whose status both the right of hospitality and that of permanent visitorship would apply.

The right of hospitality entails a claim to temporary residency that cannot be refused, if such refusal would involve the destruction—Kant's word here is "*Untergang*"—of the other. To refuse sojourn to victims of religious wars, to victims of piracy or ship-wreckage, when such refusal would lead to their demise, is untenable, Kant writes. What is unclear in Kant's discussion is whether such relations among peoples and nations involve acts of supererogation, going beyond the call of moral duty, or whether they entail a certain sort of moral claim concerning the recognition of "the rights of humanity in the person of the other."<sup>64</sup>

We may see here the juridical and moral ambivalence which affects discussions of the right of asylum and refuge to this day. Are the rights of asylum and refuge, rights in the sense of being reciprocal moral obligations which, in some sense or another, are grounded upon our mutual humanity? Or are these right claims in the legal sense of being enforceable norms of behavior which individuals and groups can hold each other to and, in particular, force sovereign nation-states to comply with? Kant's construction provides no clear answer. The right of hospitality entails a moral claim with potential legal consequences in that the obligation of the receiving states to grant temporary residency to foreigners is anchored in a republican cosmopolitical order. Such an order does not have a supreme executive law governing it. In this sense the obligation to show hospitality to foreigners and strangers cannot be enforced; it remains a voluntarily incurred obligation of the political sovereign. The right of hospitality expresses all the dilemmas of a republican cosmopolitan order in a nutshell: how to create quasi-legally binding obligations through voluntary commitments and in the absence of an overwhelming sovereign power with the ultimate right of enforcement?

No matter how unsatisfactory some of his formulations may have been, Kant's claim that first entry cannot be denied to those who seek it if this would result in their "destruction" (*Untergang*) has become incorporated into the Geneva Convention of 1951 on the Status of

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64. Kant, *supra* note 53, at 46 (translation altered).

Refugees and its Protocol of 1967, as the principle of “non-refoulement.” This principle obliges signatory states not to forcibly return refugees and asylum seekers to their countries of origin if doing so would pose a clear danger to their lives and freedom. Of course, just as sovereign states can manipulate the meaning of the terms of this article to define life and freedom more or less narrowly as it befits their purposes, it is also possible to circumvent the “non-refoulement” clause by depositing refugees and asylees in so-called “safe third countries.”

Kant clearly foresaw and justified such balancing acts between the moral obligations of states to those who seek refuge in their midst and to their own welfare and interests. The lexical ordering of the two claims—the moral needs of others versus legitimate self-interest—is vague, except in the most obvious cases when the life and limb of refugees would be endangered by denying them the right of entry; apart from such cases, however, the obligation to respect the liberty and welfare of the guest can permit a narrow interpretation on the part of the sovereign to whom it is addressed, and need not be considered an unconditional duty.

The universal right to hospitality, which is due to every human person, imposes upon us an imperfect moral duty to help and offer shelter to those whose life, limb, and well-being are endangered. This duty is “imperfect,” i.e., conditional, in that it can permit exceptions, and can be overridden by legitimate grounds of self-preservation. There is no obligation to shelter the other when doing so would endanger one’s own life and limb. It is disputed in moral philosophy as to how widely or narrowly the obligation to the other should be interpreted,<sup>65</sup> and it is equally controversial how we should understand legitimate grounds of self-preservation: Is it morally permissible to turn the needy away because they dilute our cultural mores? Does the preservation of culture constitute a legitimate basis of self-preservation?

Kant’s *Perpetual Peace* essay signaled a watershed between two conceptions of sovereignty and paved the way for the transition from the first to the second. We can name these “Westphalian sovereignty”

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65. Compare Henry Sidgwick:

[B]ut those who are in distress or urgent need have a claim on us for special kindness. These are generally recognised claims: but we find considerable difficulty and divergence, when we attempt to determine more precisely their extent and relative obligation: and the divergence becomes indefinitely greater when we compare the customs and common opinions now existing among ourselves in respect of such claims, with those of other ages and countries.

Henry Sidgwick, *The Methods of Ethics* 246 (7th ed. 1962) (1874). For some recent treatments, see Onora O’Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (1996); Samuel Sheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (2001).

and "liberal international sovereignty."<sup>66</sup> In the classical Westphalian regime of sovereignty, states are free and equal; they enjoy ultimate authority over all objects and subjects within a circumscribed territory; relations with other sovereigns are voluntary and contingent and limited in kind and scope to transitory military and economic alliances as well as cultural and religious affinities; above all, states "regard cross-border processes as a 'private matter' concerning only those immediately affected."<sup>67</sup>

By contrast, in conceptions of liberal international sovereignty, the formal equality of states is increasingly dependent upon their subscribing to common values and principles such as the observance of human rights and the rule of law and respect for democratic self-determination. Sovereignty no longer means ultimate and arbitrary authority; states who treat their citizens in violation of certain norms, who close borders, prevent freedoms of market, speech and association and the like are thought not to belong within a specific society of states or alliances; the anchoring of domestic principles and institutions in principles shared with others like oneself becomes crucial.

Certainly in *The Law of Peoples*, Rawls followed Kant's legacy insofar as he too made recognition of the sovereignty of peoples conditional upon their subscription to respect for human rights and non-belligerence. The more robust Kantian vision of cosmopolitan justice which regards individuals as moral agents in the international arena to whom states owe obligations of justice, and in the first place the obligation to respect cross-border movements, is absent from Rawls's vision. Even from within the confines of the historical limitations of his day, Kant envisaged a dynamic, expanding and necessarily interdependent world society. Rawls's vision of the "Society of Peoples," by contrast, is not inspired by the dynamism of commerce and curiosity, by exploration and the search for liberty; rather, it is the quest for order and stability that motivates it.

Kantian liberalism stands at the threshold of a modern world expanding globally, while Rawls's vision, for fully understandable reasons, is governed by the memories of two World Wars, the Holocaust and the Cold War, which had barely ended when *The Law of Peoples* was written. To imagine new principles for a post-Westphalian order, of which the Rawlsian *The Law of Peoples* is surely one of the first testimonies, we will need to recover some of the radicalism of Kantian cosmopolitan justice.

The phenomena of migration, along with the predicament of asylum seekers and refugees in the contemporary world, touch some of the

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66. See Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* 20 (1999); David Held, *Law of States, Law of Peoples: Three Models of Sovereignty*, 8 *Legal Theory* 1, 5 (2002).

67. Held, *supra* note 66, at 4.

deepest sources of interests and passions in liberal democratic societies. While universalists and cosmopolitans judge the closed door policy of the wealthy nations of Europe and North America to be a form of organized hypocrisy which will not bear philosophical scrutiny, decline of citizenship theorists point to values such as the rule of law, a vibrant civic culture and active citizenship, which are equally important to such societies and which they consider threatened by world-wide migrations. To sort out these contemporary debates is beyond the scope of this Essay.

In conclusion, let me only outline the constituents of a theory of *just membership*: recognizing the moral claim of refugees and asylees to *first admittance*; a regime of *porous* borders for immigrants; an injunction against denationalization and the loss of citizenship rights, and the vindication of the right of every human being "to have rights," that is, to belong to some human community. The right to have rights entails a defense of the universal status of *personality*—i.e., of being a legal right bearer—for each and every human being. The status of alienage ought not to denude one of fundamental rights. Furthermore, just membership also defends the claim to citizenship on the part of the alien when and if she has fulfilled certain conditions. Permanent alienage is not only incompatible with a liberal democratic understanding of human community, it is also a violation of human rights. This claim to membership must be accommodated by practices that are non-discriminatory in scope, transparent in formulation and execution, and justiciable when violated by states. The doctrine of state sovereignty, which has so far shielded naturalization, citizenship and denationalization decisions from scrutiny by international as well as constitutional courts, must be challenged on these grounds as well as others.<sup>68</sup>

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68. See Benhabib, *supra* note 55.

## *Notes & Observations*